

# Seattle Journal for Social Justice

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Volume 10 | Issue 2

Article 3

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April 2012

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Salma Yusuf

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### Recommended Citation

Yusuf, Salma (2012) "The Rise of Judicially Enforced Economic, Social, and Cultural Rights—Refocusing Perspectives," *Seattle Journal for Social Justice*: Vol. 10 : Iss. 2 , Article 3.

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## **The Rise of Judicially Enforced Economic, Social & Cultural Rights— Refocusing Perspectives**

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Salma Yusuf

### **ABSTRACT**

There is little disagreement that the past two decades have been characterized by a rise in the judicial enforcement of economic, social and cultural rights (ESCRs) in several regions of the world. As a result, there has been a tendency to assume that the debate on the justiciability of ESCRs and the attendant judicial role has been settled once and for all. However, this article demonstrates that an abandonment of the debate altogether would be fallacious. While acknowledging that the conventional concerns surrounding the debate have been considerably thwarted, this article proposes the need for a shift in focus to new issues that have surfaced in recent times. The emergence of a “changed landscape” for the judicial enforcement of ESCRs has arisen as a consequence of the development of a set of phenomena that will be outlined in this article. This article also argues that because this set of phenomena has a direct bearing on the judicial enforcement of ESCRs, each of the phenomena goes to the heart of the debate on the judicial role in such situations. Further, this article makes a case for revisiting the judicial role in the wake of this “changed landscape,” a task that becomes not only inevitable, but necessary as well. Finally, this article engages in a reconsideration of the judicial role in this changed context.

### **INTRODUCTION**

It is incorrect to contend that the debate on the justiciability of ESCRs is fading away. Equally flawed is the assertion that the focus of the debate has remained stagnant. In fact, two legal systems in particular stand out for being

activist and progressive in this field: those of South Africa and India. What is required, therefore, is a clarification of both positions.

Prior to the 1990s, the debate on the justiciability of ESCRs was primarily a theoretical one, based for the most part on mere speculation and pure conjecture.<sup>1</sup> Today, however, it has become apparent that the era of justiciability of ESCRs has taken on real practical meaning<sup>2</sup> and has taken root in domestic legal systems in several regions of the world.<sup>3</sup> The debate has thus, “moved on to the point where the wisdom of allowing judges the power to enforce social rights is no longer seriously questioned,”<sup>4</sup> but rather to a place, as this article argues, where there is growing recognition of a *need* for judges to step in so as to give full meaning to the realization of these rights.<sup>5</sup> Hence, what is required is not an abandonment of the debate on the justiciability of these rights, but rather a shift to a new set of questions that beg our attention.

At the outset, this article raises the question as to whether, and to what extent, the debate on the justiciability of ESCRs has been settled. Further, this article argues that analogous to the rise of judicially enforced ESCRs, the development of a set of phenomena is also on a rise. These phenomena include the emergence of a new constitutional order, as well as transnational judicial conversations, institutional conversations, the judicialization of politics, and the growing campaign arguing that freedom from poverty be considered a legal right. While these phenomena may be viewed as occurring parallel to the rise

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<sup>1</sup> ROBERTO GARGARELLA, COURTS AND SOCIAL TRANSFORMATION IN NEW DEMOCRACIES: AN INSTITUTIONAL VOICE FOR THE POOR? 255 (2006).

<sup>2</sup> See generally JUDICIAL PROTECTION OF ECONOMIC, SOCIAL, AND CULTURAL RIGHTS: CASES AND MATERIALS (Tony Solomonides & Bertrand G. Ramcharan eds., 2005) [hereinafter JUDICIAL PROTECTION]

<sup>3</sup> *Id.*; GARGARELLA, *supra* note 1, at 255.

<sup>4</sup> GARGARELLA, *supra* note 1, at 255.

<sup>5</sup> S. Muralidhar, *Economic, Social and Cultural Rights: An Indian Response to the Justiciability Debate*, in ECONOMIC, SOCIAL & CULTURAL RIGHTS 23 (Yash P. Ghai & Jill Cottrell eds., 2004) (“[T]he question to be asked is probably not whether the court should intervene or is capable of intervening but whether judicial intervention will enable the progressive realization of ESCRs”).

in judicial enforcement of ESCRs, this article demonstrates that they are actually part of the cause of this type of enforcement.

Further, this intersectionality has refashioned the backdrop in which the debate has hitherto been located, and thus calls for re-examination. This article will not explore each of these phenomena in its entirety, but will instead explore some of the facets that might be considered relevant for this discussion. This article will then demonstrate that the altered setting of the debate on justiciability has led to the need to re-conceptualize the judicial role in terms of the enforcement of ESCRs. This article will explore how the current phenomena are refashioning the backdrop of the discussion on the role of the judiciary in enforcing ESCRs. It becomes evident that the setting is altered to such a significant extent as to warrant special, continued consideration. The article seeks to provide the basis and serve as a catalyst for future exploration of the subject.

There is, however, a caveat to the article's goal, as it does not intend to imply that the phenomena dealt with herein are either exhaustive or comprehensive. Its primary purpose is to flag the need to constantly rethink and revisit the debate on justiciability with fresh perspectives in the wake of constantly emerging developments, as they might prove to be crucial to the perception of the judicial role.

The article also serves to illustrate the point that this debate is not static; instead, it is constantly evolving. This evolution demands vigilance in watching varying influences in the future. One might imagine a slight hint of this resonating within the work of writers who argue that "[t]he variable nature of the concept of justiciability, depending on the nature of the issue sought to be adjudicated upon as well as on the constitutional role envisaged for the court, defies formulation of precise standards to control judicial functioning in the area."<sup>6</sup> This statement seems to refer to "external influences" apart from the

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<sup>6</sup> MATTHEW C.R. CRAVEN, *THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A PERSPECTIVE ON ITS DEVELOPMENT* 28 (1995).

inherent nature of the judicial system itself such as the type of issue before the court or the constitutional provisions prescribed. The present discussion utilizes this vein of thinking and seeks to build upon it by making a case for the inclusion of other external but relevant phenomena such as those listed above. Such influences impact the context in which the debate on justiciability ought to be viewed.

Within the larger discussion of the implementation of ESCRs, this article does not intend to suggest that the judiciary be considered a panacea to the economic, social, and cultural ills suffered by disadvantaged and marginalized sections of society, but rather wishes to extend a more tempered, realistic proposition that judges can play a crucial role in the entire process.<sup>7</sup> Hence, it contributes to an overarching view that the role of the judiciary in the enforcement of these rights must not be ignored or trivialized.

The call for continuing the debate is frequently dismissed because critics say that there is an over-emphasis on the legal aspect<sup>8</sup> and a detraction from what actually warrants attention.<sup>9</sup> However, a continued engagement in the debate is justified on the basis of the need for, and benefits of, a “narrow focus” on justiciability. This narrow focus would be one that “helps to reveal the nature of ESCRs and its differences, if any, from civil and political rights, the modalities of enforcement of ESCRs, and the articulation of court with other agencies for their protection and enforcement, all of which help to uncover the specificity of the judicial role.”<sup>10</sup>

There are three main objections that have been advanced in relation to the justiciability of ESCRs. First, there is the purported distinction between

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<sup>7</sup> Dennis M. Davis, *Socioeconomic rights: Do they deliver the goods?*, 6 INT’L J. CONST. L. 687 (2008); COURTING SOCIAL JUSTICE: JUDICIAL ENFORCEMENT OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN THE DEVELOPING WORLD (Varun Gauri & Daniel M. Brinks eds., 2008). See generally GARGARELLA, *supra* note 1. For an assessment of impact on society at large, see Muralidhar, *supra* note 5.

<sup>8</sup> HENRY J. STEINER ET AL., INTERNATIONAL HUMAN RIGHTS IN CONTEXT LAW POLITICS AND MORALS 298 (1996).

<sup>9</sup> Muralidhar, *supra* note 5, at 23.

<sup>10</sup> *Id.*

economic, social, and cultural rights on the one hand, and civil and political rights on the other. Second, there are two legitimacy concerns, namely that it offends democratic principles and violates the constitutional doctrine of the separation of powers. Third, there is a fear that judges do not have the capability to deal with polycentric issues that have implications for budgetary and policy decisions that are considered to be the prerogative of the executive arm of government.

This article will examine the validity of these objections, both separately and together, with their respective counter-arguments. It begins with an examination of the latter two objections, which have been the most contentious of the three. Any discussion leading to the consideration of the judicial role in the enforcement of ESCRs would, naturally, be aborted if the questions from the skeptics have *not* been dealt with and, hence, becomes crucial to the overall debate. Further, as most debates on the judicial role are inextricably linked to these objections, it becomes necessary to examine the objections, at least briefly, before moving to the next question.

The second part of the article proposes that the emergence of “a changed landscape” has created a new context for consideration in the debate on the justiciability of ESCRs.

In the third part, the article moves on to a reconsideration of the judicial role in the enforcement of ESCRs in the wake of the proposed changed context. It does so by drawing on the discussion and arguments made in the preceding sections of the article while focusing on three particular aspects of the judicial role: 1) interpretation of the meaning of ESCRs; 2) judicial review of executive action; and 3) the provision of remedies. The limitations inherent in the judicial role in the enforcement of ESCRs, though not the main focus of the debate, will be flagged at relevant instances.

## PART 1: JUSTICIABILITY—DEFYING THE SKEPTICS

*A. Concerns of Legitimacy***1. Violation of the Doctrine of Separation of Powers**

The legitimacy concerns raised in connection with the judicial enforcement of ESCRs emanate from two sources. First, some claim that judicial enforcement of ESCRs encroaches into the legislative domain, thereby usurping the prerogative over decisions on matters involving budgetary implications; hence, judicial intervention in this area results in violation of the doctrine of separation of powers.<sup>11</sup>

A more logical and commonsensical approach, however, would be to argue for a “balance of power,” which must be “maintained by judgments of political morality rather than formal accounts of the separation of powers.”<sup>12</sup> But judges appear to be well aware of the potential danger of breaching the doctrine of separation of powers when enforcing ESCRs.<sup>13</sup> This has been illustrated in cases such as *Olga Tellis v. Bombay Mun. Corp.*,<sup>14</sup> where the Supreme Court of India went only so far as to require that the government serve notice before removing pavement hawkers, but not to the point of prescribing that the government make houses available for all of its citizens. This ruling is significant because it demonstrates how the Indian Supreme Court went only

<sup>11</sup> Marius Pieterse, *Coming to terms with Judicial Enforcement of Social Rights*, 20 S. AFR. J. HUM. RTS. 383, 386–391 (2004). See Cecile Fabre, *Constitutionalizing Social Rights*, 6 J. POL. PHIL. 263 (1998) [hereinafter Fabre, *Constitutionalizing*]; Craig Scott & Patrick Macklem, *Constitutional Ropes of Sand or Justiciable Guarantees?: Social Rights in a New South African Constitution*, 141 U. PA. L. REV. 1, 18 (1992).

<sup>12</sup> Trever R. S. Allan, *Constitutional Dialogue and the Justification of Judicial Review*, 23 OXFORD J. LEGAL STUD. 563, 584 (2003) [hereinafter Allan, *Constitutional Dialogue*]. See also Geraldine van Bueren, *Including the Excluded: The Case for an Economic, Social and Cultural Human Rights Act*, X PUB. L. 456 (2002).

<sup>13</sup> Jheelan Navish, *The Enforceability of Socio-economic Rights*, 12 EUR. HUM. RTS. L. REV. 146, 146–57 (2007).

<sup>14</sup> *Tellis v. Bombay Mun. Corp.*, [1986] A.I.R. 18. (India) (exploring the idea of housing as a social right in the case of hawkers, who, when removed from their place of abode, were denied the right to housing).

so far as to require that the government inform citizens when it was implementing a policy and did not go so far as to prescribe what course of action the government ought to take in making redress.<sup>15</sup> Likewise, a similar awareness was displayed in the judgment of *Soobramoney v. Minister of Health, Kwazulu-Natal*,<sup>16</sup> where the Constitutional Court of South Africa noted its reluctance “to interfere with rational decisions taken in good faith by the political organs . . . whose responsibility it is to deal with such matters.”<sup>17</sup>

Such examples, however, might be neutralized by skeptics who cite other cases and allege that judges have “gone too far.” But it is indeed possible to enforce such rights without violating the doctrine of separation of powers.<sup>18</sup> This argument is not weakened by the mere fact that some judges have not been practicing this enforcement. The judiciary is capable of acting with responsibility and fairness in protecting the rights of victims while not violating the notion of separation of powers. Further, this argument provides examples of the awareness that judges are capable of exercising as they seek to maintain sensitive balances by being activist and creative at the same time.

Further, as in the case of *Simla*,<sup>19</sup> we can once again observe the value of judicial involvement in enforcing ESCRs. In that case, the Indian Supreme Court sought to rectify the ‘mandate creep,’ the lower court had gone beyond what it was mandated to do. Through the hierarchical structure of the courts, the inherent institutional ability for higher courts to correct “wrong” decisions in lower courts becomes evident. This basic feature of hierarchy and appeals in the judicial system neatly contributes to maintaining efficiency and credibility of the judiciary when it seeks to enforce ESCRs. In other words, the efficacy of

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<sup>15</sup> *Olga Tellis v. Bombay Mun. Corp.*, [1985] S.C.R. 51 (India).

<sup>16</sup> *Soobramoney v. Minister of Health, Kwazulu-Natal*, 12 B.C.L.R. 1696 (1997) (S. Afr.).

<sup>17</sup> *Id.*

<sup>18</sup> *See, e.g., Bermudez v. Minister of Health and Social Assistance Supreme Court of Justice, Supreme Court of Justice of Venezuela*, Case No. 15.789, Decision No. 918, at 916 (July 15, 1999); *Himachal Pradesh v. A Parent of a Student of Med. College (Simla)*, 1985 A.I.R. 910, 1985 SCR (3) 676 (India).

<sup>19</sup> *Simla*, 1985 A.I.R. 910.



an appeals system functions as a safeguard in the judicial process, and it applies equally to the adjudication of all legal cases, and ESCRs are no exception. Below, this article will demonstrate the weakness in skeptics' arguments that there is an overly expansive application of power in emerging phenomena such as the principle of constitutional dialogue.

## 2. The Democratic Objection

The second concern frequently voiced over legitimacy springs from the claim that it is "counter-majoritarian," in that judicial enforcement of ESCRs takes away from the elected members of government and transfers to the judiciary, an unelected body, the task of making challenging decisions on competing claims regarding resource allocation. The decisions are usually challenging, as they require choices to be made between purposes for which the same resource base is important. This task, some believe, is best left to the elected branches of the state that are either directly or indirectly accountable to the public.<sup>20</sup>

While admitting that these are indeed difficult choices to make, adjudicating on negative rights is just as difficult.<sup>21</sup> Civil and political rights are referred to as 'negative rights' while ESCRs are referred to as 'positive rights' because the former requires, in most cases, that the state *not* interfere or obstruct the realization of rights, whereas the latter generally requires proactive measures on the part of the state.<sup>22</sup> If adjudication on negative rights is legitimized on the

<sup>20</sup> Scott & Macklem, *supra* note 11, at 17; CECILE FABRE, SOCIAL RIGHTS UNDER THE CONSTITUTION: GOVERNMENT AND THE DECENT LIFE 183 (2000) [hereinafter FABRE, SOCIAL RIGHTS]; Pieterse, *supra* note 11, at 10–12; David Wiseman, *The Charter and Poverty: Beyond Injusticiability*, 51 U. TORONTO L.J. 425, 443 (2001).

<sup>21</sup> See FABRE, SOCIAL RIGHTS, *supra* note 20, at 176.

<sup>22</sup> See, e.g., *Government of South Africa v. Grootboom* (Grootboom), 11B.C.L.R. 1169 at [34] (2000) (holding that "there is at the very least a negative obligation placed upon the state and all other entities and persons to desist from preventing or impairing the right of access to adequate housing"); *Airey v. Ireland* 2 E.H.R.R. 305 (1979) (finding that the state had a positive duty in relation to a right to a fair trial where legal aid was deemed applicable to civil cases). See generally *The Enforceability of Socio-Economic Rights*, EUROPEAN

basis that such rights are imperative to the protection of autonomy, so might a similar view be advanced with regards to ESCRs.<sup>23</sup> In order for the autonomy of the citizenry to be protected, the well-being and welfare of the populace must also be protected. For example, when basic needs such as health care and housing are not met, the individual will not be able to exercise autonomy through an enjoyment of, among others, rights such as the freedom of expression and association. Hence, for meaningful fulfillment of civil and political rights, the realization of ESCRs becomes *sine qua non*.<sup>24</sup>

Do such responses then suggest that the judiciary operates in a vacuum, insulated from any accountability?<sup>25</sup> This is certainly not the case. Various measures of accountability exist, including: transparency facilitated by public observation of hearings; the requirement of judges to explain and justify their decisions; the appointment of judges through a formal, credible process; and utilization of the doctrine of binding precedent.<sup>26</sup>

Moreover, this concern reflects what some contend are varying definitions of the concept of democracy. “The crowning proof of democracy in our times is the growing acceptance and enforcement of the idea that democracy is not the same thing as majority rule; in a real democracy minorities possess legal protections in the form of a written constitution, which even a democratically elected assembly cannot change.”<sup>27</sup> Because minorities are most vulnerable to

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HUMAN RIGHTS LAW REVIEW (2007) (arguing that socioeconomic rights can be expressed either positively or negatively).

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> See, e.g., Rajeev Dhavan, *Judges and Accountability*, in JUDGES AND THE JUDICIAL POWER (R. Dhavan et al. eds., 1985).

<sup>26</sup> Pieterse, *supra* note 11, at 10–15; Alon Harel, *Rights based Judicial Review: A Democratic Justification*, 22 L. & PHIL. 247, 258 (2003).

<sup>27</sup> RAN HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM 1–2 (Harvard Univ. Press 2004). See also GARGARELLA, *supra* note 1, at 13–14 (attempting to propose a model that is neither conservative (based on Alexander Hamilton and Justice Marshall) nor the progressive view of those like Michael Walzer, but rather one that is better suited to judicial enforcement by drawing on E. Goodin’s theory of deliberative democracy); Pieterse, *supra* note 11, at 11 (noting that “judicial review

violations of their ESCRs, legal protection and the subsequent judicial enforcement can go a long way in effectuating their rights. Thus, one might argue that judicial review fulfills rather than frustrates the notion of democracy through the protection of minority groups that lack political power and voice.<sup>28</sup> Furthermore, the judiciary fulfills accountability by arriving at reasoned decisions.<sup>29</sup> Moreover, the judicial function can be defended on account of the fact that it serves as a guardian of a *process* that provides space for the democratic participation of citizens to challenge injustices that have resulted from a violation of rights, as opposed to being seen as an institution which makes *substantive* decisions concerning the lives of members of the public.<sup>30</sup>

Finally, the growing trends of, *inter alia*, transnational judicial conversations, the “constitutionalization” of ESCRs, and the process of constitutional dialogue have all further strengthened the legitimacy of a judicial role in the realization of ESCRs (see *infra* Part II).

### *B. Concerns of Competence*

Concerns over judicial competence in adjudicating ESCRs have been expressed at several levels. Among others, the primary claim is that the judiciary is ill-equipped and lacks the technical know-how to: first, make decisions that have government budgetary implications and involve resource allocations;<sup>31</sup> second, to take decisions that involve competing policy choices;<sup>32</sup> third, that it lacks tools to discern violations of ESCRs; and<sup>33</sup> fourth,

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maybe justified where the benefits that are gained outweigh the derogation from direct democracy” and that this would provide a voice for the poor and be a shield from what Ronald Dworkin described as the “tyranny of the majority.”).

<sup>28</sup> JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT 2 (1980).

<sup>29</sup> See Dhavan, *supra* note 25.

<sup>30</sup> See *id.*

<sup>31</sup> Cecile Fabre, *Constitutionalising Social Rights*, 6 J. POL. PHIL. 263, 280 (1998).

<sup>32</sup> Etienne Mureinik, *Beyond a Charter of Luxuries: Economic Rights in the Constitution*, 8 S. AFR. J. HUM. RTS. 464, 464–74 (1992); Sandra Liebenberg, *Socio-economic Rights in CONSTITUTIONAL LAW OF SOUTH AFRICA* (Mathew Chaskalson et al. eds., 1999).

that courts do not have the “systematic overview of government policy” and are thus ill-suited to create and enforce government programs.<sup>34</sup>

Several responses to these concerns could significantly weaken the arguments. For example, a suggested solution could be to have the judges trained in the necessary specialist skills and enable consultation with independent experts such as medical practitioners, educators, or social scientists who would help to better frame the factual matter before the court.<sup>35</sup> Furthermore, judicial preview of the law and group action, albeit a weaker protection of constitutional rights requiring a “minimum” of housing, health care, *inter alia*, to be afforded by the government is a possible way to retain the values of constitutionalization while circumventing the difficulty facing the judiciary in deciding violations of individual claims.<sup>36</sup> Judicial preview dictates that a matter is considered by the court not after a violation of a person’s rights has occurred, but rather before the matter arises in court—thereby covering all persons or groups entitled to the right. It is a proactive measure and necessitates an activist, creative, and innovative approach by the judiciary—by contrast to the process of judicial review, whereby the court plays its traditional responsive role and considers the aspect of a person’s right only after the violation has occurred. This form of judicial action retains the values of constitutionalization because it upholds the ‘minimum core’ requirement referred to in the preceding discussion and avoids the danger of compromise that comes with judicial review. Some might contend, however, that the alleged concerns over judicial capacity mask even deeper concerns. The skepticism surrounding judicial enforcement of ESCRs seemingly has more to do with

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<sup>33</sup> Cass R. Sunstein, *Against Positive Rights*, in *WESTERN RIGHTS? POST-COMMUNIST APPLICATION* 225 (Andras Sajó ed., 1996).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* See G.L. Peiris, *Public Interest Litigation in the Indian Subcontinent: Current Dimensions*, 40 INT’L & COMP. L.Q. 66 (1991). See, e.g., *Kendra v. State of Uttar Pradesh*, 986 Supp. S.C.C. 596 (1985) (India). See also *Barse v. Union of India*, 3 S.C.C. 596 (1986) (India) (stating that a wide mandate was given to an independent commission so as to enable maximum cooperation of all jails in their investigations); Navish, *supra* note 13.

<sup>36</sup> See generally JUDICIAL PROTECTION, *supra* note 2; GARGARELLA, *supra* note 1.

ideological concerns.<sup>37</sup> Further, without legitimacy, the judiciary would be deterred from “tak[ing] the first steps”<sup>38</sup> in building expertise that could lead to an enhancement of its capacity for adjudicating issues involving ESCRs.<sup>39</sup> While these arguments appear reasonable, they do not directly respond to the concerns of competence raised *supra* part B. They must not be dismissed, however, as they strengthen the “direct” responses to the concerns raised.

Furthermore, skeptics raise another serious concern: the “polycentric”<sup>40</sup> nature of disputes that is characteristic of ESCRs cases. Some believe that the reason for this lies in the nature of the character of the litigation framework,<sup>41</sup> where “certain kinds of human relations are not appropriate raw material for a process of decision that is institutionally committed to acting on the basis of reasoned argument.”<sup>42</sup> The fact that dispute adjudication is subject to adversarial proceedings that do not adapt well to decision making on polycentric issues<sup>43</sup>—and how all persons are likely to be affected—cannot be gathered before the court.<sup>44</sup> These concerns have been allayed by new, creative judicial models in countries like India, where the Supreme Court has developed the model of Public Interest Litigation and Special Commissions,<sup>45</sup> the former model of judicial preview creates an enabling environment for consideration of the implications of decisions beyond parties appearing before the court, and the latter model facilitates an inquisitorial-type of judicial

<sup>37</sup> See JUDICIAL PROTECTION, *supra* note 2; GARGARELLA, *supra* note 1.

<sup>38</sup> Scott & Macklem, *supra* note 11, at 25.

<sup>39</sup> *Id.*

<sup>40</sup> Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 394 (1978). See also Liebenberg, *supra* note 32.

<sup>41</sup> Pieterse, *supra* note 11, at 12–14.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> Prafullachandra Natwarlal Bhagwati, *Judicial Activism and Public Interest Litigation*, 23 COLUM. J. TRANSNAT'L L. 561, 574–75 (1985); Pieris, *supra* note 35. See generally ENFORCING INTERNATIONAL HUMAN RIGHTS IN DOMESTIC COURTS (Benedetto Conforti & Francesco Francioni eds., 1997) (exploring ways in which domestic courts are dealing with international human rights issues).

proceedings. Though the desirability of each of these methods is not without challenge,<sup>46</sup> the point being made here is that if the judiciary has to, it is capable of adopting such creative models in new situations as the need arises.

The concern regarding polycentricity requires a response. First, “the pervasiveness of polycentricity”<sup>47</sup> has been widely accepted<sup>48</sup> as relevant to all disputes, including those involving civil and political rights.<sup>49</sup> Second, since this criticism goes to the root of the nature of the dispute and not to the nature of the adjudicating body; it does not mean that the executive branch or the legislative branch are in a better position to make such decisions when compared to the judiciary.<sup>50</sup> Third, despite Fuller’s assertion that contrary evidence does not weaken his theory, there is increasing resistance to such a view.<sup>51</sup> Perhaps what is required then is a “more sophisticated analysis of judicial competence”<sup>52</sup> as adopted in the United States, or, alternatively, “refining the doctrine to render it more consistent with the role of courts in contemporary society”<sup>53</sup> before further reliance is placed on this theory as a means to justify a restrained attitude for the judiciary.<sup>54</sup>

### *C. Final Thoughts*

The first part of the article has examined two of the main criticisms leveled against the justiciability of ESCRs by deconstructing several facets that each embraces. It has demonstrated that such objections no longer stand up in the

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<sup>46</sup> Surya Deva, *Public Interest Litigation in India: a critical review*, 28 CIV. JUST. Q. 19, 7–10 (2009).

<sup>47</sup> Jeff A. King, *The Pervasiveness of Polycentricity*, Pub. L. 101–124 (2008).

<sup>48</sup> *Id.*; Pieterse, *supra* note 11, at 12–14. See generally Dennis M. Davis, *The case against the inclusion of Socio-economic demands in a Bill of Rights as Directive Principles*, 8 S. AFR. J. HUM. RTS. 475 (1992).

<sup>49</sup> Pieterse, *supra* note 11, at 12–14.

<sup>50</sup> *Id.*.

<sup>51</sup> See King, *supra* note 47 (noting that Lon Fuller is a theorist on polycentricity and arguing that his doctrine should be refined or rejected).

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

face of the many recent developments and persuasive counterarguments explored. Taking the debate one step further, this article suggests that the development of new phenomena has a double bearing on the debate of justiciability: first, by having a chilling effect on the objections to ESCRs and thereby further weakening the skeptics' case, and second, by contributing to a "changed landscape" for the judicial enforcement of ESCRs. This is not to suggest that a new landscape displaces the former, but rather that it alters the backdrop within which the debate has hitherto been located.

## PART 2: A CHANGED LANDSCAPE FOR THE JUDICIAL ENFORCEMENT OF ESCRs—IDENTIFYING CONTRIBUTING FACTORS

### *A. A New Constitutional Order*

A recent and growing trend in many states has been the incorporation of ESCRs into national constitutions. This trend saw a related growth in the enforcement of ESCRs, both in national jurisdictions and regional systems. The trend experienced "an astonishingly rapid transition to what may be called 'juristocracy,' . . . where constitutional reform has transferred an unprecedented amount of power from representative institutions to judiciaries."<sup>55</sup> The emergence of this new constitutional approach, however, has manifested itself in three distinct traditions. First, that ESCRs are purely aspirational and should not be included as concrete constitutional provisions; second, that they should be embodied in the constitution but with a limited, conservative function of being non-justiciable guiding principles of state policy; and third, the more progressive approach of being incorporated as specific rights capable of judicial adjudication.<sup>56</sup>

<sup>55</sup> HIRSCHL, *supra* note 27, at 1.

<sup>56</sup> See generally Albie Sachs, *The Judicial Enforcement of Socio-Economic Rights: The Grootboom Case*, in DEMOCRATISING DEVELOPMENT: THE POLITICS OF SOCIO-ECONOMIC RIGHTS IN SOUTH AFRICA 131 (Peris Jones & Kristian Stokke eds., 2005).

While academics strenuously contest the desirability of incorporating ESCRs into constitutions,<sup>57</sup> judicial review may be seen to promote rather than offend the notion of democracy through the protection of politically powerless groups.<sup>58</sup> It gives a voice to the voiceless so that when their ESCRs have been violated, they can bring their grievances to court; they have an avenue to address their grievances, and the judiciary fills a void by empowering them.

The desirability of including ESCRs in constitutional documents also varies with geopolitical context. In the West, this might not be problematic or harmful. In the East, conversely, constitutionalization of ESCRs “is a large mistake, possibly a disaster” because the countries are transitioning from communism to a market economy.<sup>59</sup> Transition states are undergoing changes structurally and substantively, and many will seek to change or enact new constitutions that keep with the ideologies towards which they aspire. Further, the exclusion of these rights from a nation’s constitution shuts out the possibility of judicial efforts to rectify structural social, economic, and cultural inequalities, particularly in hesitant and timid judicial cultures. On the other hand, non-inclusion of rights might not deter an activist judiciary from initiating or challenging action on behalf of marginalized individuals or groups. Nevertheless, the incorporation of such rights in constitutions as directive principles of state policy as enforceable rights adds legitimacy to judiciaries that aim to enforce them.

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<sup>57</sup> Frank I. Michelman, *Socio-Economic rights in Constitutional Law: Explaining America Away*, 6 INT’L J. CONST. L. 663, 3–6 (2008) (discussing whether non-inclusion in actual fact makes a difference in the American context given the welfare obligations and undertakings of the government. Further, it looks at reasons why such rights should or should not be included in the U.S. Constitution). See generally Sunstein, *supra* note 33; FABRE, SOCIAL RIGHTS, *supra* note 20; Nicholas Haysom, *Constitutionalism, Majoritarian Democracy and Socio-Economic Rights*, 8 S. AFR. J. HUM. RTS. 451 (1992); Etienne Mureinik, *Beyond a Charter of Luxuries: Economic Rights in the Constitution*, 8 S. AFR. J. HUM. RTS. 464 (1992); HIRSCHL, *supra* note 27; CASS R. SUNSTEIN, DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO 222 (2001).

<sup>58</sup> Scott & Macklem, *supra* note 11, at 137.

<sup>59</sup> Sunstein, *supra* note 33, at 225.



Skeptics are concerned that constitutionalization of ESCRs detracts attention from the main purpose of a constitution: to protect civil liberties and regulate between the different branches of government. When citizens assert their rights, the corresponding obligations of the state are engaged (i.e. to protect civil and political liberties), and thereby citizens are protected from oppression.<sup>60</sup> An oppressive government typically denies people their liberties of free speech and movement. It takes steps to prevent the depressing eventuality where people have their civil liberties protected, but their basic needs are unmet—therefore preventing them from enjoying the former.<sup>61</sup>

A closely related phenomenon to the constitutionalization of social rights is the “judicialization of politics.” This concept has been described as the infusion of judicial decision-making and of court-like procedures into new political arenas.<sup>62</sup> The constitutionalization of ESCRs is also said to have political consequences through what has been termed the “global expansion of judicial power.”<sup>63</sup> This phenomenon too does not escape the discussion on judicial involvement in ESCRs, but contributes to the changing landscape in the judicial enforcement of ESCRs.<sup>64</sup> For better or for worse, the expansion of judicial power will shape global politics and policy for the foreseeable future. Recent practice, some argue, shows a movement toward government by the judiciary—where the judicial arm of the state governs and seems to hold the greatest decision-making power—as opposed to total majoritarianism—where a numerical majority in parliament or the executive make decisions for the entire country with all its peoples.<sup>65</sup> Notwithstanding the normative justifications advanced for or against the incorporation of ESCRs into national

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<sup>60</sup> *Id.* at 222.

<sup>61</sup> *Id.*

<sup>62</sup> TORBJÖRN VALLINDER, THE GLOBAL EXPANSION OF JUDICIAL POWER 515–16 (C. Neal Tate & Torbjörn Vallinder eds., 1997).

<sup>63</sup> *Id.* See generally HIRSCHL, *supra* note 27, at 31 (discussing of the impacts and effects on democratic rule as a result of this trend which has been set afoot by the incorporation of such rights in the Constitution).

<sup>64</sup> See VALLINDER, *supra* note 62.

<sup>65</sup> *Id.*

constitutions, this phenomenon affects judicial power and alters the landscape for the debate on the judicial enforcement of ESCRs.<sup>66</sup>

“The belief that judicially affirmed rights are a force of social change removed from the constraints of political power has attained near sacred status in public discussion.”<sup>67</sup> Thus, the new constitutional order that embraces the constitutionalization of ESCRs has shifted the debate from the traditional concerns of *whether* ESCRs ought to be the subject of judicial adjudication to *what extent* the judiciary should be empowered to intervene.

#### *B. Transnational Judicial Conversations*

Transnational judicial conversations signal new possibilities for the judiciary’s ability to enforce ESCRs. The conversations provide an additional avenue of enrichment for the “judicial project” by creating a channel for the exchange and sharing of its judicial knowledge and expertise, skills, and substantive jurisprudence. Transnational judicial conversations have been described as “worldwide dialogue”<sup>68</sup> where the “courts are talking to one another all over the world.”<sup>69</sup> Their relevance and prospects for the future only signal an increase in momentum, one in which soon “no lawyer will be able to advise a client on any matter which might involve a public authority without studying not just the European jurisprudence, . . . but also American case law, Canadian case law, and even Indian case law and Australian and New Zealand case law.”<sup>70</sup>

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<sup>66</sup> See generally HIRSCHL, *supra* note 27.

<sup>67</sup> *Id.* at 1.

<sup>68</sup> SUPREME BUT NOT INFALLIBLE: ESSAYS IN HONOUR OF THE SUPREME COURT OF INDIA 214 (B.N. Kirpal et al. eds., 2000).

<sup>69</sup> Anne-Marie Slaughter, *A Typology of Transjudicial Communication*, 29 U. RICH. L. REV. 99, 99 (1994)

<sup>70</sup> Lord Scarman, Human Rights Bill, 582 HL Debs. 1268 (Nov. 1997), available at <http://hansard.millbanksystems.com/lords/1997/nov/03/human-rights-bill-hl>.

Not surprisingly, however, this phenomenon elicits concerns, both in terms of trend and appropriateness.<sup>71</sup> For instance, some have expressed concern about the superimposition of the United States and British reasoning into Indian courts, which are very different from each other.<sup>72</sup> While acknowledging the logic expressed in this view, however, this practice should not be abandoned completely on this ground alone, as there are nations that do in fact share similar, comparable realities.<sup>73</sup> The occasion when the practice does not suit the comparable realities of another jurisdiction and context simply does not justify a wholesale abandonment of the practice.

International human rights and legal scholars like Geraldine van Bueren argue that the lack of jurisprudence in the international sphere could be cited as one of the reasons for the absence of rich and robust jurisprudence on ESCRs in domestic legal systems.<sup>74</sup> This philosophy becomes obvious when contrasted with the robustness of jurisprudence in civil and political rights.<sup>75</sup> Accordingly, I predict that rich jurisprudence on ESCRs developed regionally and internationally would undoubtedly be a useful guide to judges in domestic national courts.

At this juncture, three developments are relevant to mention. First, the European Court of Human Rights adopted the Optional Protocol, which has

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<sup>71</sup> SUPREME BUT NOT INFALLIBLE, *supra* note 68, at 66. *See generally* Slaughter, *supra* note 69; Mark V. Tushnet, *The Possibilities of Constitutional Law*, 108 YALE L.J. 1226 (1999); Vicki C. Jackson, *Comparative Constitutional Federalism and Transjudicial Discourse*, 2 INT'L J. CONST. L. 91 (2004); V.R. Krishna Iyer, Judge, Supreme Court of India, Inaugural Address at the Second State Lawyers' Conference (Jan. 3, 1976), *available at* <http://www.ebc-india.com/lawyer/articles/76v2a1.htm>.

<sup>72</sup> Iyer, *supra* note 71 ("Free India has to find its conscience in our rugged realities—and no more in alien legal thought").

<sup>73</sup> Geraldine Van Bueren, *Alleviating Poverty through the Constitutional Court*, 15 S. AFR. J. HUM. RTS. 74, 65–70 (1999). *See also* David Nelken, *Disclosing/Invoking Legal Culture: An Introduction*, 4 SOC. & LEGAL STUDIES 435, 440 (1995) ("We necessarily have the sense of living in an interdependent global system marked by borrowing and lending across porous cultural boundaries, and that Human Rights is one of the areas of law with the greatest ability to travel.").

<sup>74</sup> Van Bueren, *supra* note 73, at 58. *See generally* Nelken, *supra* note 73.

<sup>75</sup> Van Bueren, *supra* note 73, at 65. *See generally* Nelken, *supra* note 73.

taken us one step closer to achieving an international forum for development of ESCR jurisprudence. Although this process will take time, its potential should not be disregarded.

Second, we are witnessing the slow emergence of ESCR jurisprudence in regional human rights bodies—for instance, with the indirect protection accorded to socio-economic rights by the European Courts of Human Rights.<sup>76</sup> The merits of such indirect protection are topics for separate discussion. This trend in regional human rights bodies relates to the socio-economic rights and has contributed to the changed landscape.

Third, transnational judicial conversations are beginning to alter the landscape of the judicial enforcement of ESCRs as applied by the judiciary in countries throughout the world. For example, South African judges are “empowered, although not obligated, to consider foreign law, which includes foreign legal approaches, but where the provisions of the South African Bill of Rights replicates Indian Constitutional provisions, the South African Constitutional Court is under a greater duty to consider Indian jurisprudence.”<sup>77</sup> The reverse is also true. In the recent Indian case of *Kuldip Nayar v. Union of India*,<sup>78</sup> substantial engagement is seen with the reasoning of the South African case of *SACC New National Party of South Africa v. Government of Republic of South Africa and Aeronautica Nazionale Repubblicana*,<sup>79</sup> and the decision in *United Democratic Movement v. President of the Republic of South Africa*.<sup>80</sup>

Does the phenomenon of transnational judicial conversations contribute to strengthening the legitimacy of judicial involvement in ESCRs? The answer to

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<sup>76</sup> EVA BREMS, *EXPLORING SOCIAL RIGHTS* (Daphne Barak-Erez & Aeyal Gross eds., 2007).

<sup>77</sup> Van Bueren, *supra* note 73, at 68. *See also* Nelken, *supra* note 73.

<sup>78</sup> *See, e.g.*, *Nayar v. Union of India*, 7 S.C.C. 1 (2006) (India).

<sup>79</sup> *See, e.g.*, *SACC New National Party of South Africa v. Government of Republic of South Africa and Aeronautica Nazionale Repubblicana* 1999 (3) SA (CC) at 191 (S. Afr.).

<sup>80</sup> *See, e.g.*, *United Democratic Movement v. President of the Republic of South Africa*, 2003 (1) S.A. 495 (CC) (S. Afr.).

this question could be “yes” because such a system will go some distance in alleviating longstanding concerns that judges operate in a vacuum.<sup>81</sup> For example, this could be done by facilitating a system of exchange and sharing of judicial expertise and skills, thereby ensuring that the judiciary is in fact subject to external influences (i.e., the legal reasoning employed by other courts in similar situations). Drawing on international and regional jurisprudence might aid judges in their day-to-day affairs, lend legitimacy to their decisions, and therefore generate greater acceptance of their decisions.

This argument might, however, also be viewed with suspicion. Can it truly be external when this “conversation” remains within the judicial fraternity?<sup>82</sup> Each country has its own judicial culture, and the influence from another jurisdiction does in fact become external, which can prove to be a positive practice in its neutralization of any inherent prejudices. Moreover, “the jurisprudence of Constitutional Courts in other jurisdictions is a useful source of guidance to any judge seeking to give meaning to a human rights instrument.”<sup>83</sup> Finally, so long as there are other methods and mechanisms in place to facilitate representation of marginalized groups in decision making and their participation, transnational judicial conversations can advance the legitimacy of the courts in enforcement of ESCRs.

The preceding discussion demonstrates the entry of the phenomenon of transnational judicial conversations into the domain of ESCRs, both indirectly through regional jurisprudence and directly in constitutions. First, this has altered the backdrop of the debate on justiciability of ESCRs. Second, it answered the question of whether this trend can be used to strengthen the case that ESCRs are not justiciable on grounds of capacity and legitimacy. Third, the emergence of this phenomenon led to a changed role for judges in the

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<sup>81</sup> See Scott & Macklem, *supra* note 11, at 137 (describing this as “cold halls of an institution far removed from the pulse of the nation.”).

<sup>82</sup> See generally Christopher McCrudden, *A Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights*, 20 OXFORD J. LEGAL STUDIES 499 (2000).

<sup>83</sup> Lord Irvine of Lairg, *Activism & Restraint: Human Rights and the Interpretive Process*, 4 EUR. HUM. RTS. L. REV. 350, 355 (1999).

enforcement of ESCRs. Finally, it can have a significant impact on the debate of justiciability of ESCRs. This issue is important to consider in the context of the judicial enforcement of ESCRs.

*C. Institutional Dialogue*<sup>84</sup>

The definition of “constitutional dialogue”<sup>85</sup> advanced by Luc Tremblay, a scholar who has contributed to the development of the concept of ‘constitutional dialogue,’ embraces the proposition that this phenomenon can be used to allay concerns over the legitimacy of judicial involvement.<sup>86</sup> He defines “institutional dialogue” as essentially a process whereby executives and legislatures “participate in a dialogue aimed at achieving the proper balance between constitutional principles and public policies and the existence of this dialogue constitutes a good reason for not conceiving of judicial review as democratically illegitimate.”<sup>87</sup> To begin a debate on which organ of government is superior to another is a futile exercise.<sup>88</sup> If the criteria ought to be election to office, the executive should be an equally autonomous sovereign to Parliament; thereby defeating the notion of Parliamentary sovereignty.<sup>89</sup> An examination of government systems like the bicameral legislature of the

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<sup>84</sup> For the purposes of the present discussion, “constitutional dialogue” and “institutional dialogue” are used interchangeably.

<sup>85</sup> See Peter W. Hogg & Allison A. Bushell Thornton, *Charter Dialogue between Courts and Legislatures (or Perhaps the Charter of Rights Isn't Such a Bad Thing After All)* 35 OSGOODE HALL L.J. 75, 81 (1997). For other theories of institutional dialogue from the lens of constitutionalism, see Kent Roach, *Constitution and Common Law Dialogue Between the Supreme Court and Canadian Legislatures*, 80 CAN. BAR REV. 481 (2006); KENT ROACH, *THE SUPREME COURT ON TRIAL: JUDICIAL ACTIVISM OR DEMOCRATIC DIALOGUE* (Irwin Law ed., 2001); Kent Roach, *Dialogue or Defiance: Legislative Reversals of Supreme Court Decisions in Canada and the United States*, 4 INT'L J. CONST. L. 347 (2006) (discussing the merits for constitutional dialogue in situations where there are overriding and limitation clauses in countries such as Canada, when compared to the United States, where this has not been possible).

<sup>86</sup> Luc B. Tremblay, *Legitimacy of Judicial Review: The Limits of Dialogue Between Courts and Legislatures*, 3 INT'L J. CONST. L. 617, 622–23 (2005).

<sup>87</sup> *Id.* at 617. See Allan, *Constitutional Dialogue*, *supra* note 12.

<sup>88</sup> See Allan, *Constitutional Dialogue*, *supra* note 12.

<sup>89</sup> See *id.*

United Kingdom's Parliament as one constituting an unelected House of Lords disproves the idea of Parliament's sovereignty because at least one section of the British parliamentary system is not elected.<sup>90</sup> Therefore, the real debate should be about legitimacy and constitutional principles<sup>91</sup> and not about which organ of government is superior to another.

The United Kingdom demonstrates that parliamentary sovereignty can also affront the rule of law and *ultra vires*. By being supreme and sovereign—and therefore 'above the law'—it violates the notion of rule of law where all entities are considered subject to it. Furthermore, the critics of judicial review who argue that it is an affront to the rule of law can be defeated by their own argument.<sup>92</sup> The debate on judicial review has not been focused on the issue of legitimacy.<sup>93</sup> Rather, the critics of *ultra vires* welcomed and praised the contribution of the common law.<sup>94</sup> Hence, common law stands as a testament to the fact that judges do in fact make law. In the words of Lord Reid: "There was a time when it was thought almost indecent to suggest that Judges make law—they only declare it. Those with a taste for fairy tales seem to have thought that in some Aladdin's cave there is hidden the common law in all its splendor and that on a judge's appointment there descends on him knowledge of the magic words Open Sesame. . . . But we do not believe in fairy tales anymore."<sup>95</sup>

The concept of dialogue, as suggested by Allan, has been subject to skepticism.<sup>96</sup> Judicial responsibility, Tremblay<sup>97</sup> argues, requires judges to be

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<sup>90</sup> *See id.*

<sup>91</sup> *See id.*

<sup>92</sup> *See id.*

<sup>93</sup> *See id.*

<sup>94</sup> *See id.*

<sup>95</sup> Lord Reid, *The Judge as Lawmaker*, 12 J. SOC'Y PUB. TEACHERS L. 22, 22 (1972); H.W.R. WADE, *CONSTITUTIONAL FUNDAMENTALS* 78 (1989) ("[J]udges are up to their necks in policy, as they have been all through history"); *Dutton v Bognor Regis Urban District Council*, 1 QB 373, 391 (1972) ("In the end, it will be found to be a question of policy, which we, as judges, have to decide.").

<sup>96</sup> Tremblay, *supra* note 86, at 622–23 (arguing that the type of dialogue described as granting legitimacy to judicial review "does not and cannot exist," though he recognizes that

loyal to their decisions and willing to justify them through concrete reasoning.<sup>98</sup> He claims that this is incompatible with the formulation of the “dialogue as deliberation” model, which calls for flexibility on the part of judges even to the point of being willing to change their position on a matter.<sup>99</sup> He declares that judges must not “subordinate their own convictions and practical judgments to the will or judgments of others.”<sup>100</sup> Can we argue that the “dialogue as deliberation” model advocates *rational persuasion* and not *coercion*? Can we not contend that when a judge begins to retreat from a previously held position through genuine agreement and conviction, it is not “subordination”? Should not the “supremacy of reason”<sup>101</sup> be the ultimate winner in such a situation? When a judge’s original view has been displaced willingly and voluntarily by another view, is it subordination? Perhaps it is possible that the argument of incompatibility has discrepancies. Perhaps Tremblay’s charge of incompatibility becomes relevant only in a situation where a judge is *forced* to change his or her mind against his or her will.

Nevertheless, requiring judges to not change their minds is to assume that judges are the best decision makers.<sup>102</sup> Tremblay takes the argument one step further by construing “justification” by the judiciary of their decisions as a

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there is some dialogue taking place). Tremblay introduces two definitions of dialogue, namely, “dialogue as deliberation” and “dialogue as conversation.” He argues that the former is the type that would be successful in lending legitimacy to judicial review. He claims, however, that this model is not compatible with the notion of judicial responsibility, which he argues is inextricably linked with the rule of law and essence of judicial function. *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 635.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 634.

<sup>101</sup> Trevor R.S. Allan, *Human Rights and Judicial Review: A Critique of ‘Due Deference’*, 65 CAMBRIDGE L.J. 671, 694 (2006) (“A ‘legal culture of justification’ demands the supremacy of reason; and reason is persuasive argument, closely tailored to the circumstances of the particular case in question.”) [hereinafter Allan, *Human Rights*].

<sup>102</sup> See generally Richard Ekins, *Judicial Supremacy and the Rule of Law*, 119 L.Q. REV. 127 (2003) (demonstrating how the judicial function is better for interpreting rather than making the law).



means of making the judiciary “subordinate” to the legislature.<sup>103</sup> However, this is a dangerous proposition to make since it might allow judges to operate in a vacuum and not be held accountable to the legislature. Ultimately, this result runs counter to the purpose of the judicial role because it would threaten the legitimacy of the judicial function.<sup>104</sup>

The preceding discussion illustrates the fact that the concept of institutional dialogue brings legitimacy to the judicial enterprise. It also demonstrates how it can counter the claim that judicial enforcement of ESCRs violates the doctrine of separation of powers by arguing for a balance of power, rather than the traditional notion of a strict separation of powers.<sup>105</sup> Therefore, it is not true that it lacks legitimacy. The notion of “institutional dialogue” considered by Allan suggests a changed role for the judiciary.<sup>106</sup> He proposes a role defined less as one where the judiciary merely fills legal spaces or gaps, but rather as one that takes on a more positive flavor based on the notion of “shared sovereignty”<sup>107</sup> in a “more formal sense”<sup>108</sup> where “authority is divided.”<sup>109</sup> Hence, under this perspective, the role of the court is one that ought to be more than simply picking up the missing pieces to finish off the work of the legislature. It suggests a far more proactive and meaningful presence for the

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<sup>103</sup> Tremblay, *supra* note 86, at 634–35.

<sup>104</sup> Allan, *Human Rights*, *supra* note 101, at 695 (“By forestalling or curtailing such argument, a doctrine of deference threatens to displace law and reason, strictly applied, by expediency and arbitrariness.”).

<sup>105</sup> Allan, *Constitutional Dialogue*, *supra* note 12, at 563 (“There must be a balance of power between law-giver and interpreter, maintained by judgments of political morality rather than formal accounts of the separation of powers.”); Pieterse, *supra* note 11, at 404 (arguing that *inter alia*, in the wake of the new formulation for the doctrine of separation of powers envisaged by the South African Bill of Rights together with the prevalence of a diluted or different conception of democracy, it would be counterproductive to keep lamenting this fact by pretending that it is still threatening); *see also* Part 1; Allan, *Human Rights*, *supra* note 101.

<sup>106</sup> Allan, *Constitutional Dialogue*, *supra* note 12, at 563.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

judiciary; one which the judiciary has shown to be capable of sustaining. This perspective calls for a reconceptualization of the judicial role.

#### *D. Final Thoughts*

The second part of the article sought to advance the argument of a “changed landscape” that has confronted the debate on the justiciability of ESCRs by identifying prevalent phenomena, which are on the rise in several different regions of the world. The set of phenomena explored in this chapter is not intended to be an exhaustive list.<sup>110</sup> Instead, the three examples provided directly and substantially bear on the debate. This section demonstrates how these phenomena go to the heart of the debate on the judicial role. Moreover, these debates are predicted to escalate and should by no means be ignored.

Further, although each has a significant bearing on the debate, the interaction and close interplay will likely impact the context of the judicial enforcement of ESCRs such that the effect of the sum is greater than its parts. This part of the article served two primary purposes. First, it further weakened the skeptics’ case. Secondly, it demonstrated that the changed context for the judicial enforcement of ESCRs is a reality that has resulted in the need for reconsideration of the judicial role.

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<sup>110</sup> There was a renewed interest and momentum in the establishment of freedom from poverty as a human right, as evidenced by the development of the Legal Empowerment of the Poor (LEP) approach to dealing with poverty and further the setting up of the Committee on the Legal Empowerment of the Poor (CLEP) in 2005. See Dan Banik, *Legal Empowerment as a Conceptual and Operational Tool in Poverty Eradication*, 1 HAGUE J. RULE L. 117, 117 (2009). See, e.g., Matthew Stephens, *The Commission on Legal Empowerment of the Poor: An Opportunity Missed*, 1 HAGUE J. RULE L. 132, (2009). See also Stephen Golub, *The Commission on Legal Empowerment of the Poor: One Big Step Forward and A Few Steps Back for Development Policy and Practice*, 1 HAGUE J. RULE L. 101 (2009); LAW AND POVERTY: THE LEGAL SYSTEM AND POVERTY REDUCTION (Lucy Williams et al. eds., 2004). Yet another factor that might be seen as contributing to the changed landscape to the debate on justiciability of ESCR is the adoption of the Optional Protocol and the potential impact it has on the justiciability debate if and when it is instituted. See Part 1.

## II. RECONCEPTUALIZING THE JUDICIAL ROLE

This section examines the role that the judiciary plays in the wake of the proposed “changed landscape” that emerged as a result of the weakened skepticism in the justiciable nature of ESCRs and the corresponding “rise” of phenomena. This discussion addresses the inherent limitations in such a judicial role. The aim of this part of the article, however, is not to focus on the shortcomings of the judiciary, but rather to demonstrate how the judiciary can in fact contribute to the implementation of ESCRs.

Several aspects of the United Nations’ framework governing judicial conduct reinforces arguments advanced in parts 1 and 2 of this article while at the same time rendering direct legitimacy to judicial involvement in the domain of enforcing ESCRs. The Economic and Social Council (ECOSOC) of 2006 recalled the need for member states “to achieve *international cooperation* in promoting and encouraging human rights and fundamental ‘principles.’”<sup>111</sup> The development of the trend of transnational judicial conversations<sup>112</sup> gains legitimacy from this provision of the ECOSOC by arguing that it facilitates meeting the requirement of “international cooperation” in the field of human rights adjudication by setting in motion avenues for the sharing of mutually enriching bodies of jurisprudence. Thus, in addition to the legitimacy derived from national constitutions—such as the South African constitution—this principle of judicial conduct might also be used to justify and legitimize a judge’s substantive engagement with relevant international human rights jurisprudence.

Moreover, the ECOSOC upholds “the importance of a competent”<sup>113</sup> judiciary. The ECOSOC’s conclusions reinforce the need for competence in matters under adjudication that go so far as to require judges not only “to

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<sup>111</sup> U.N. Economic & Social Council, *Bangalore Principles of Judicial Conduct: Strengthening the Principles of Judicial Conduct* (2006), available at <http://www.un.org/docs/ecosoc/documents/2006/resolutions/Resolution%202006-23.pdf> (emphasis added).

<sup>112</sup> See Part 2.

<sup>113</sup> U.N. Economic & Social Council, *supra* note 111.

maintain and enhance . . . knowledge, skills, and personal qualities necessary for the proper performance of judicial duties,”<sup>114</sup> but also to be “subject to suspension or removal only for reasons of incapacity . . . that render them unfit to discharge their duties.”<sup>115</sup>

The ECOSOC also recognizes that “judges are accountable for their conduct to appropriate institutions established to maintain judicial standards which are themselves independent and impartial.”<sup>116</sup> This recognition allays the concern that judges are free from any accountability,<sup>117</sup> although the lack of the “public” dimension of accountability might remain contested.

These provisions have value in that they create international standards for the government of the judiciary. However, while these standards have general applicability, it must be borne in mind that it is neither desirable nor feasible to have a single “formula” or a “one-size-fits-all” approach for the judicial role; to do so would negate the varying legal and political realities of each country.<sup>118</sup> Thus, it is useful to consider the problems any country envisaging the “constitutionalization” of ESCRs and the consequent protection by the judiciary would need to address because there is a core set of factors that would need to be addressed in any context.<sup>119</sup>

The following section attempts to carve out a judicial role in relation to ESCRs. It will embrace a three-pronged approach to examine the function of the judiciary in three areas where it is most active and most contested: namely, interpreting the meaning of ESCRs, judicial review of executive action, and the provision of remedies.

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<sup>114</sup> *Id.*

<sup>115</sup> Office of the U.N. High Commissioner for Human Rights, *Basic Principles on Independence of the Judiciary* (1985), available at <http://www2.ohchr.org/english/law/indjudiciary.htm>.

<sup>116</sup> U.N. Economic & Social Council, *supra* note 114.

<sup>117</sup> *See* Part 1.

<sup>118</sup> *See generally* FABRE, *SOCIAL RIGHTS*, *supra* note 20.

<sup>119</sup> *Id.*

### *A. Interpreting the Meaning of ESCRs*

Fabre, an international commentator who has addressed the constitutional dimensions of social rights comprehensively, argues that the ESCR trainings prescribed for judges are deficient in that they only present a “piecemeal”<sup>120</sup> perspective on the execution of social rights and do not embrace the holistic view of a government’s duty, which is essential to this function of interpretation.<sup>121</sup> This argument, though reasonable, does not seem to take into account the merits of effecting “constitutional dialogue” between the three organs of government.<sup>122</sup> Though such dialogue might not completely assuage this concern, it provides some clarity as to what the executive intends by facilitating a cooperative relationship between the three organs of democratic government.

Fabre’s second argument holds more ground; he laments the “reactive” nature of adjudication whereby the government performs its duty only after a case is brought to court and “once harm is [already] done.”<sup>123</sup> This concern might also be refuted through the practice of “judicial preview”<sup>124</sup>: where the laws are assessed for congruence with principles of legality, legitimacy, and natural justice prior to implementation; where the Constitutional Court issues decisions that will be applicable to the entire group or individuals falling within the ambit of the particular law in question, as opposed to consideration of implications of the law for the one individual case before it.<sup>125</sup> Fabre observes, however, that the system of judicial preview ensures that government policy is not over-simplified by consideration through the perspective of one individual case only, but rather engages in a holistic manner as is intended by

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<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> See Part 2.

<sup>123</sup> FABRE, SOCIAL RIGHTS, *supra* note 20, at 270.

<sup>124</sup> *Id.* at 283.

<sup>125</sup> See *id.* See generally *And Justiciability for All?: Future Injury Plaintiffs and the Separation of Powers*, 109 HARV. L. REV. 1066 (1996); *Soering v. United Kingdom*, 11 Eur. Ct. H.R. 439 (1989).

the original intent of the government policy.<sup>126</sup> Additionally, the concept of judicial preview does not address the situation where incompatibility of law with constitutional provisions is seen only after the violation.<sup>127</sup> Thus, a possible solution would be to allow both systems, namely, judicial review, which is the judicial capacity to review the soundness of lower court decisions, and judicial preview, to be at the disposal of the judiciary and to be utilized depending on the nature of the case before the court.

Similarly, the proactive approach taken by courts such as the Supreme Court of India has helped meet some of the shortfalls of excluding victims who remain anonymous to a court. Moreover, it has changed the model of Public Interest Litigation (PIL), which is litigation in protection of the public that is introduced in a court of law by the court itself or by a third party; it is not necessary that the victim of the violation personally approach the court.<sup>128</sup>

However, scholars like David Bilchitz<sup>129</sup> and Rosalind Dixon<sup>130</sup> defend and even advocate a role for judges in filling in “blind spots”<sup>131</sup> of law in order to better protect the interests of minorities and unseen members of a society. It is important, however, for the judiciary to ground its decisions in legitimate legal ideals, otherwise it may face abstraction and ultimate collapse.<sup>132</sup>

This would best be highlighted if we imagine a judiciary in the United States that decided to stop working inside the framework of the US Constitution. Consider a situation where the courts no longer looked to legitimate legal

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<sup>126</sup> See FABRE, SOCIAL RIGHTS, *supra* note 20.

<sup>127</sup> FABRE, SOCIAL RIGHTS, *supra* note 20.

<sup>128</sup> Surya Deva, *Public Interest Litigation in India: A Critical Review*, 28 CIV. JUST. Q. 19, 19–40 (2009) (explaining that Public Interest Litigation has been warned of carrying the attendant danger of the judiciary “[using] Public Interest Litigation as a device to run the country on a day-to-day basis” or “a façade to fulfill private interests, settle political scores or gain easy publicity”).

<sup>129</sup> See DAVID BILCHITZ, POVERTY AND FUNDAMENTAL RIGHTS: THE JUSTIFICATION AND ENFORCEMENT OF SOCIO-ECONOMIC RIGHTS 135–234 (2007).

<sup>130</sup> Rosalind Dixon, *Creating Dialogue About Socio-Economic Rights: Strong Form Versus Weak Form Judicial Review Revisited*, 5 INT’L J. CONST. L. 391, 391–418 (2007).

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

principles such as the US Constitution in determining their cases. Without this framework of legitimacy, the court would face constant criticism and invalidation, and eventually collapse. Several judicial models<sup>133</sup> of interpretation, such as those of “reasonableness,” “dignity-equality-freedom,” and “equality,” have been devised as tools to aid judges in defining the scope and ambit for ESCRs.<sup>134</sup> The ultimate goal is to create a model that facilitates a socially transformative judicial role that is also legitimized through practical application. The models discussed above highlight the way in which the courts are capable of ingenuity and creativity despite debate over the best method to reach this goal.

The judiciary’s role in the enforcement of norms is clearly compatible with its traditional function and still subject to the same methods of accountability. The International Commission of Jurists is explicit about the judges’ interpretative role in ESCRs: “In cases when different legal interpretations are possible, . . . assigning judges a role in the enforcement of these norms is absolutely compatible with the traditional function performed by the judiciary.”<sup>135</sup> However, giving courts the right to be the final authority on the scope and ambit of rights<sup>136</sup> is not to say that their powers are unfettered. Frameworks of judicial conduct that limit unfettered judicial discretion in carrying out this function have been laid down and need to be looked upon

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<sup>133</sup> See generally BILCHITZ, *supra* note 129 (examining the merits and shortfalls of each model); Aarthi Belani, *The South African Constitutional Court’s Decision in TAC: A “Reasonable” Choice?*, (Ctr. for Human Rights and Global Justice, Economic, Social and Cultural Rights Series, Working Paper No. 7, 2004) (discussing the merits and shortfalls of reasonableness standard).

<sup>134</sup> See Rosalind Dixon, *Creating Dialogue About Socio-Economic Rights: Strong Form Versus Weak Form Judicial Review Revisited*, 5 INT’L J. CONST. L. 391, 391–418 (2007).

<sup>135</sup> INT’L COMM’N OF JURISTS, COURTS AND THE LEGAL ENFORCEMENT OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS: COMPARATIVE EXPERIENCES OF JUSTICIABILITY 77 (2008).

<sup>136</sup> THE NEW CONSTITUTIONAL AND ADMINISTRATIVE LAW 96 (Iain Currie & Johan de Waal eds., 2001).

fairly.<sup>137</sup> These frameworks maintain the legitimacy of the judiciary's interpretations and conduct.

A more tempered view is that judges should be seen only as contributing to—and not enjoying—the sole prerogative in this interpretative duty. The judiciary's duty should be one of “assisting other branches of government.”<sup>138</sup> Through this approach, a spirit of “inter-institutional cooperative interaction”<sup>139</sup> could be built without losing sight of the court's duty to promote “human dignity, [equality] and freedom” through rights adjudication.<sup>140</sup>

#### *B. Judicial Review*

Part of the court's interpretative role is the duty of review that arises when a party alleges non-compliance by the state. This alleged non-compliance often involves violation of ESCRs through the state's actions in a case brought before the court. The more judicial review is restrained and restricted through high burdens of proof or limited access for those whose ESCRs are violated, the more there are concerns about judicial incapacity and lack of legitimacy.<sup>141</sup>

All that judges can do in a restrained judicial system is to make a determination as to whether standards in the constitution are adhered to in formulating budgets.<sup>142</sup> The original decision on making budgets is left to the elected organs of government.<sup>143</sup> Therefore, it is arguable that merely because cases like *Minister of Health and Others v. Treatment Action Campaign (TAC)* “may have budgetary implications, . . . courts are not themselves directed at

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<sup>137</sup> Pieterse, *supra* note 11, at 24–40.

<sup>138</sup> *Id.* at 27–28; Geraldine van Bueren, *Alleviating Poverty through the Constitutional Court*, 15 S. AFR. J. HUM. RTS. 52, 64–65 (1999).

<sup>139</sup> Pieterse, *supra* note 11, at 28.

<sup>140</sup> Craig Scott & Philip Alston, *Adjudicating Constitutional Priorities in a Transnational Context: A Comment on Soobramoney's Legacy and Grootboom's Promise*, 16 S. AFR. J. HUM. RTS. 206, 242 (2000).

<sup>141</sup> See BILCHITZ, *supra* note 129.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*



rearranging budgets.”<sup>144</sup> As writers like Pieterse, an author of leading works on ESCRs, observe, “the fact is that courts are not ill equipped to *scrutinize or evaluate* budgets or policies just because they are ill equipped to *engage* in budgetary or policy making.”<sup>145</sup> In order to make such determinations, courts and elected bodies ought to formulate criteria for making judgments on budgetary issues.<sup>146</sup> This will undoubtedly lend legitimacy to their verdicts on ESCR matters.

Judicial review is justified on the grounds that judicial review is justified on the grounds of being valuable in terms of remedying violations of rights that are a consequence of undesirable governmental policy-making. It is by no means intended to displace and replace government policy making with judicial policy making.<sup>147</sup> Further, the concept of “constitutional dialogue” could serve as a “middle ground” and is often used as a justification for legitimizing judicial review.<sup>148</sup> Writers like Tushnet, a writer on the concepts of judicial review and preview as well as judicial systems generally, also support “weak-form review,”<sup>149</sup> as it prevents the judiciary from encroaching into the policy-making domain of the elected branches of government.<sup>150</sup>

I argue that “weak-form review” is the recommended approach for all types of rights since it acknowledges and balances two important factors: the vaguely defined right, on the other hand, is balanced with the judiciary’s construction of what the right ought to be, on the other.<sup>151</sup> However, one must remember that this form of review is not always easy to sustain because it has the attendant danger of swinging to either extreme: where judges begin to

<sup>144</sup> *Id.*; Pieterse, *supra* note 11, at 410 (citing Minister of Health and Others v. Treatment Action Campaign (No. 2) CCT8/02, 5 July 2002).

<sup>145</sup> Pieterse, *supra* note 11, at 29 (emphasis added).

<sup>146</sup> *Id.*

<sup>147</sup> See FABRE, SOCIAL RIGHTS, *supra* note 20.

<sup>148</sup> See Part 2.

<sup>149</sup> MARK TUSHNET, WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW Preface, 228–52 (2007).

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*; See Dixon, *supra* note 130.

make policy decisions through “strong form”<sup>152</sup> judicial review, or where elected officials do not acknowledge the judicial role in such matters.<sup>153</sup> The danger of a “slip down either side of the slope” could be mitigated by having the judiciary sensitized to such dangers, thereby raising awareness on the rightful limitations inherent in its role.

### *C. Provision of Remedies*

There is no history or legacy of awarding remedies for violations of ESCRs. Some contend that it is in the awarding of remedies that the judiciary becomes most vulnerable to overstepping its mark.<sup>154</sup>

In South Africa, for example, courts are empowered with a broad mandate to award remedies.<sup>155</sup> Section 38 of the South African Constitution (regarding the duty to provide “appropriate relief”) and Section 172(1)(b) (allowing the judiciary to “make any order that is just and equitable”) indicate considerable space for judicial discretion and innovation in the area of providing remedies.<sup>156</sup>

The terms “appropriate” and “just and equitable” are inherently ambiguous. While tradition has granted the South African courts broad award powers, the language itself could be read either way. These words may be said to provide a framework within which decisions are to be made, and thus constrain judicial decision-making. However, as notions of “appropriateness” and “just and equitable” are all subjective, relative terms, judges do indeed have a broad “margin of appreciation” in making such decisions.

Some controversy has existed regarding whether or not the judiciary should provide for “building an enforcement mechanism into the remedy awarded.”<sup>157</sup> Indeed, as the South African case of *Government of the Republic of South*

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<sup>152</sup> TUSHNET, *supra* note 149, at 228–52.

<sup>153</sup> *Id.* .

<sup>154</sup> Pieterse, *supra* note 11, at 32–38.

<sup>155</sup> Pieterse, *supra* note 11.

<sup>156</sup> *Id.* at 32–38.

<sup>157</sup> *Id.* at 36.

*Africa v. Grootboom*<sup>158</sup> demonstrates, the court's opinion once again goes to the heart of balancing interests of legal legitimacy with interests of effectiveness in enforcing ESCRs.

Commentators in the justiciability of ESCRs such as scholar and commentator Marius Pieterse suggest further guidelines for judicial activity in this area. He argues for facilitating "inter-institutional interaction"<sup>159</sup> through respecting the doctrine of separation of powers and designing creative remedies only in instances where traditional ones are ineffective.<sup>160</sup> He argues that the remedies must be designed in such a way that they do not have far-reaching implications on parties unconnected to a case.<sup>161</sup>

A possible means of allowing a judicial role in this area while not encroaching on the mandate of the other organs of the state would be to send the statute back to the legislature for amendment, as in cases such as *Grootboom*.<sup>162</sup> Writers like Bilchitz, a landmark scholar in the field of human rights protection and promotion, opt for rigorous review of what the right should entail and how speedily the right ought to be enforced and implemented.<sup>163</sup> Conversely, Mureinik, a commentator in the field of human rights protection, argues that the standard of review by judges should be rational and sincere consideration before a court can send a statute back. A combination of both would be useful to the judges' decision-making processes as each case might embrace a different set of realities.

Bilchitz goes one step further in envisaging a situation where a verdict declaring no shortage of resources together with a lack of competing claims on

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<sup>158</sup> *Government of the Republic of South Africa v. Grootboom*, 2000 1 S.A. 46 (S. Afr.). See Pieterse, *supra* note 11 for discussion of cases.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Grootboom*, 2000 1 S.A. 46.

<sup>163</sup> See BILCHITZ, *supra* note 129. See generally Pieterse, *supra* note 11 (utilizing a similarly robust approach to argue that "mandatory relief," as opposed to "declaratory relief," would not violate the doctrine of separation of powers, if "appropriate" in the circumstances of the case).

the same resources grants the judiciary the power to coerce the government to execute its duties.<sup>164</sup> While it is tempting to employ such an approach as a means to protect citizens in the event of either arbitrary action or inaction by oppressive governments,<sup>165</sup> it becomes problematic because it rests on the assumption that the judiciary is in the best position to make assessments on competing claims of resource allocations. Further, it carries with it an imminent danger of a situation where the judiciary is overseeing and dictating government's day-to-day spending plans. Moreover, there is also the concern that the judiciary does not have a holistic view, but rather a "piecemeal" impression of government policy.<sup>166</sup> It is in situations such as this that a healthy relationship of "constitutional dialogue" and understanding between the executive and judiciary becomes imperative.<sup>167</sup>

The other situation to be considered is one where it is pronounced by the judiciary that the government has been erroneous in the apportioning of its resources. Here too, a budget might be sent back to the government for corrective action.<sup>168</sup> While the arguments raised in part two are relevant here as well, assuming that such concerns are allayed,<sup>169</sup> such an approach would not violate the doctrine of separation of powers so long as the details are left to be worked out by the organs generally responsible for budgetary decisions. This is an example of a situation where "weak-form" review becomes attractive.

A useful approach for protecting the judiciary from sliding down the "slippery slope" toward policy making would be to mete out the requirement of having to stop at the point of a pronouncement of violation of the ESCR of the individual rather than merely providing reasons for what led them to arrive

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<sup>164</sup> See BILCHITZ, *supra* note 129.

<sup>165</sup> Wim Trengove, *Judicial Remedies for Violations of Socio-Economic Rights*, ECON. SELF RELIANCE, Mar. 1999..

<sup>166</sup> See Fabre, *Constitutionalizing*, *supra* note 11.

<sup>167</sup> See Part 2.

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

at this decision.<sup>170</sup> This approach would prevent the judiciary from being perceived as making veiled references to corrective action that the judiciary believes should be taken by the executive.

Similarly, in the broader discussion on meaningful contributions of the judiciary in enforcing ESCRs it must be borne in mind that there are a range of factors<sup>171</sup> that need to be considered. These include access to courts by marginalized and vulnerable groups and individuals, responsiveness of the courts to ESCR violations in general, and new situations where ESCRs are violated—in particular the implementation of court orders, and the response to orders by the larger public.<sup>172</sup>

#### *D. Final Thoughts*

Taking a moment to step back and observe the broader debate on what the approach of the judiciary has been,<sup>173</sup> it is clear that the notion of what it ought to be<sup>174</sup> is ripe for further discussion. Opinion is divided on which judicial approach is the most appropriate. One view is that the judiciary has been activist to a fault, while others argue that the judiciary has been too deferential

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<sup>170</sup> See ECONOMIC, SOCIAL & CULTURAL RIGHTS IN PRACTICE: THE ROLE OF JUDGES IN IMPLEMENTING ECONOMIC, SOCIAL & CULTURAL RIGHTS (Yash Ghai & Jill Cottrell eds., 2004).

<sup>171</sup> Writers like Siri Gloppen refer to this as the “Dependent Variable” in the context of the outcome and success of judicial intervention. See also GARGARELLA, *supra* note 1.

<sup>172</sup> *Id.* See e.g., Van Bueren, *supra* note 138; GARGARELLA, *supra* note 1; Victor Abramovich, *Courses of Action in Economic, Social and Cultural Rights: Instruments and Allies*, 2 SUR INT’L J. HUM. RTS. 181 (2005); Siri Gloppen, *Social Rights Litigation as Transformation: South African Perspectives*, in DEMOCRATISING DEVELOPMENT: THE POLITICS OF SOCIO-ECONOMIC RIGHTS IN SOUTH AFRICA (Peris Jones & Kristian Stokke eds., 2005); Christopher Mbazira, *Non-implementation of Court Orders in Socio-economic Rights Litigation in South Africa: Is the Cancer here to stay?* 9 ECON. SELF RELIANCE (2008).

<sup>173</sup> See COURTING SOCIAL JUSTICE: JUDICIAL ENFORCEMENT OF SOCIAL AND ECONOMIC RIGHTS IN THE DEVELOPING WORLD (Varun Gauri & Daniel Brinks eds., 2008); Carlo Guarnieri, *Courts and Marginalized Groups: Perspectives from Continental Europe*, 5 INT’L J. CONST. L. 187 (2007); GARGARELLA, *supra* note 1; ECONOMIC, SOCIAL & CULTURAL RIGHTS IN PRACTICE, *supra* note 170.

<sup>174</sup> Jackie Dugard, *Judging the Judges: Towards an Appropriate Role for the Judiciary in South Africa’s Transformation*, 20 LEIDEN J. INT’L L. 964 (2007).

to other governmental bodies.<sup>175</sup> Yet another view is that a reasonable and balanced judicial approach is advisable; namely, one that is effective and makes a valuable contribution to the overall implementation of ESCRs.

It appears, then, that the judiciary should be activist to the extent that it remains within the boundaries of its legitimacy and capability while at the same time being conscious of maintaining an effective presence in the overall implementation of ESCRs. Conversely, perhaps the judiciary should remain deferential to the extent that is required for it to maintain its legitimacy within the domain of its capability while not losing sight of contributing to the implementation of ESCRs. In other words, the judiciary should be activist enough to be effective and deferential enough not to raise concerns of legitimacy and capacity.

## CONCLUSION

The rise of judicially enforced ESCRs has raised new questions in the discussion of justiciability. However, as this article has shown, this is not to say that the original questions have been displaced and are henceforth irrelevant. Rather, it has revealed that the original questions require revisiting, but this time with a refocused lens necessitated by new developments that have a significant bearing on the original questions.

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<sup>175</sup> See Anashri Pillay, *Courts, variable standards of review and resource allocation: developing a model for the adjudication of social and economic rights*, 6 EUR. HUM. R. L. REV. 616 (2007); Narain v. Union of India: 'a court of law and not justice' – is the Indian Supreme Court beyond the Indian Constitution, *Public Law*, (2005); The University of Hong Kong Department of Law International conference on the Bill of rights, Hong Kong 20–22 June (1991) Human Rights: The Role of the Judge. The Hon. Justice Michael Kirby AC CMG Australia; Dennis M. Davis, *Socio-economic Rights: Do they Deliver the Goods?* 6 INT'L J. CONST. L. 687 (2008); GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991); Craig Scott, *Towards a Principled, Pragmatic Judicial Role*, *ECON. SELF RELIANCE* (1999); Marcel Berlins, *Our rights need better judges in their defence*, *THE GUARDIAN*, Apr. 5, 2009, <http://www.guardian.co.uk/commentisfree/2009/apr/06/strasbourg-human-rights-lord-hoffmann>; *Who needs a bad teacher when you can get a worse judge? The courts are making a mess of America's schools*, *THE ECONOMIST*, Nov. 25, 2004, <http://www.economist.com/node/3429003>; Pieterse, *supra* note 11.

The article began with an examination of the question as to whether and to what extent the debate on the justiciability of ESCRs has been settled. Through a detailed examination of two of the more important objections leveled against the justiciability of ESCRs, this article exposed the weaknesses in the skeptics' case. Furthermore, their case is weakened where judicial involvement is shown to have derived renewed strength from new constitutional conceptions of the separation of powers, new understandings of the notion of democracy, the practice of institutional dialogue between the judiciary and its elected counterparts, and finally, through the growing recourse to transnational judicial conversations.<sup>176</sup>

This article has demonstrated that analogous to the rise of judicially enforced ESCRs, there has been a corresponding "rise" in new phenomena as presented in part two, which has changed the landscape within which the role of the judiciary has hitherto been located.

Further, the article demonstrated in part three that this "changed landscape" has necessitated a reconsideration of the role of the judiciary. The reconceptualization of the judicial role has been carried out in the context of realizing the larger goal of contributing to the overall implementation of ESCRs.

The article acknowledges the importance of the "dependent variables"<sup>177</sup> in ensuring the overall effectiveness of the judicial role and though it has not been the subject of analysis in the present article, it must be flagged in view of its importance.

Further study is needed into the intersectionality between the effectiveness of the judicial role and the dependent variables, with the aim of reducing this dependency. This need for further study is important in order to improve the perception of the potential contribution of the judiciary and to avoid situations where it might be used as an excuse for ineffectiveness or inertia on the part of

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<sup>176</sup> See Parts 1 and 2.

<sup>177</sup> See Siri Gloppen, *Courts and Social Transformation: An Analytical Framework in* GARGARELLA, *supra* note 1.

the judiciary. Further study would help to demonstrate how the judicial role can be effective without being dependent on the success and interaction of the dependent variables, and how the judicial role is not contingent or conditioned on these dependent variables for its success. Instead, we should find a way of ensuring success of the role of dependent variables independently of external factors not within the courts' control.

Furthermore, the underlying suggestion of this article has been that successful enforcement of ESCRs does not automatically translate into a process of social transformation.<sup>178</sup> There has been a slow emergence of academic thought and literature on the potential of courts in the area of social transformation. This also could be an area that is worthy of further exploration, albeit carefully.<sup>179</sup> The reason for this caution is because the judiciary should not run the risk of spreading its effectiveness and contribution too thin so as to threaten its already secured role in the enforcement of ESCRs.

Moreover, further research into the effect that the new set of phenomena herein described has on the ESCRs will be welcome in deepening our understanding. This is especially the case because some of these areas are new even in understanding their own conceptualization and functioning.

Finally, the role of the judiciary should always remain effective in whatever it is conceived of as being legitimate and capable of doing. The judiciary should retain and build on its role in enforcing ESCRs. As long as this is achieved, it will keep the hopes of millions of vulnerable and marginalized communities and individuals the world over alive.

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<sup>178</sup> See e.g., GARGARELLA, *supra* note 1.

<sup>179</sup> See *id.*